Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
	)	
Regulatory Treatment of Mobile Services	)	

REPLY COMMENTS OF SPRINT CORPORATION

Sprint Corporation ("Sprint"), on behalf of the United and Central Telephone Companies, Sprint Communications Company L.P., and Sprint Cellular, respectfully replies to Comments filed in response to the Second Further Notice of Proposed Rule Making ("SFNPRM") released on July 20, 1994.

In the SFNPRM the Commission sought comment on whether certain non-equity relationships--management agreements, resale agreements, joint marketing agreements--create attributable interests for the purposes of applying the 40 MHz PCS spectrum cap, the PCS-cellular cross-ownership rules, or a general Commercial Mobile Radio Service ("CMRS") spectrum cap. The Commission questions whether these agreements should create attributable interests, notwithstanding the fact that such agreements do not give rise to either a de jure or de facto transfer of control.

The overwhelming majority of commenters opposed attribution based on these non-equity interests. Sprint agrees with the majority view. As McCaw correctly points out:

> management agreements, resale agreements and joint marketing agreements that do not otherwise constitute a de facto transfer of control have never before been considered an indicia of ownership under the Commission's policies, and there is no justification for treating them differently in the context of personal communication services ("PCS").[1]

The Commission suggested that attribution might be necessary, particularly for management agreements because:

> Management agreements, although not amounting to de facto control, may involve levels of integration between the managed licensee and the manager's company which have the effect of reducing competitive choices in the marketplace or of creating a sham or front corporation to take advantage of designated entity provisions. [2]

However, agreements such as the non-equity relationships specified in the SFNPRM that do not transfer de facto or de jure control do not and cannot provide a managing party with the ability to adversely affect competition or act as a sham corporation. As SWBT points out:

> If control of the license is shifted, the arrangement is already unlawful unless specifically approved. No further Commission rule is thus needed. If control is not shifted, however, by definition no "sham" has occurred and no "front corporation" exists. Instead the licensee remains

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1. Comments of McCaw Cellular Communications, Inc. ("McCaw") at p.1.

2. FNPRM at par. 6.

> in control, with all that means. The fact that a management or joint venture agreement may govern operations will not affect the licensee's ultimate right to direct strategies and marketing options. Indeed, the licensee must retain the right to determine and carry out policy decisions if it wants to establish that control of the license has not been transferred to a third party.[3]

Furthermore, the sizable investment that is likely to be required to obtain a PCS license argues against the possibility that a licensee would agree to any contract that could hinder competition. As PacBell notes:

> PCS licenses are going to require a very significant investment. The licensee has every incentive to carefully scrutinize any management agreement in to which it enters to ensure that the agreement will put it in the best competitive position possible. Thus, it is unlikely that even if a managing entity wanted to impede competition that it would be able to do so.[4]

Clearly, as the majority of the commenters state, there is no need for attribution due to non-equity relationships.

The lone dissenting view was that presented in the comments of Columbia PCS, Inc. ("Columbia"). Columbia starts with the proposition that the Commission's existing rules, as set forth in

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3. Initial comments of Southwestern Bell Corporation ("SWBT") at p. 5.

4. Comments of Pacific Bell Mobile Services ("PacBell") at p. 4.

Intermountain,[5] for determining when a de facto transfer of control takes place are in need of revision so that a bright line is created to "augment determinations of whether agreements confer de facto control to a party other than the licensee."[6] Columbia suggests that this bright line would distinguish between general contractor relationships and subcontractor relationships.

The subcontractor relationship would be one where the manager performs only one of a list of functional services for the licensee.[7] According to Columbia's proposal a subcontractor relationship would not trigger a transfer of control, but would cause attribution of spectrum for purposes of the various spectrum caps.

Columbia is not as clear on what constitutes a general contractor relationship, but apparently it is a relationship where

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5. Intermountain Microwave, 24 Rad.Reg. 7 (P & F) 983 (1963). The Commission said that in determining whether a transfer of control has taken place, there are six factors that must be considered. These six factors are (1) Does the licensee have unfettered use of all facilities and equipment? (2) Who controls daily operation? (3) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission? (4) Who is in charge of employment, supervision, and dismissal of personnel? (5) Who is in charge of the payment of financing obligations, including expenses arising out of operating? and (6) Who receives monies and profits from the operation of the facilities?

6. Columbia at p. 3.

7. According to Columbia these services include "strategy, planning, design, construction, sales, marketing, administration, network operations, customer service, etc." See Columbia at p. 3.

the manager has responsibility for more than one of the functions. In this circumstance Columbia proposes there has been a de facto transfer of control and thus the attribution rules become moot.

Columbia's request for change of the Commission's Intermountain de facto test is beyond the scope of this proceeding. Moreover, Columbia's suggestion that the Intermountain six criteria test needs revision is misguided. It is true, as Columbia points out, that the Court of Appeals of the D.C. Circuit recently remanded two of the Commission's transfer of control cases.[8] However, the Court did not criticize the Intermountain test, but rather criticized the application of the six criteria to the facts in each case as being inconsistent with the Commission's prior decisions under Intermountain.[9] The Court did not suggest that the test from Intermountain needs refinement or amendment, but rather that the Commission was not being consistent in how it applied the test.

Columbia's proposed treatment of both its general contractor and subcontractor relationships is also misguided. Columbia's general contractor relationship could be created simply by an

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8. See, Telephone and Data Systems, Inc. v. Federal Communications Commission, 19 F.3rd 42 (D.C. Cir. 1994) and Telephone and Data Systems, Inc. v. Federal Communications Commission, 19 F.3rd 655 (D.C. Cir. 1994)

9. See e.g., TDS at p. 50: "We therefore remand the Atlantic City order so that the Commission may bring its decision into compliance with agency precedent or explain its departure."

entity providing construction services and network operations, two of Columbia's suggested functional services, to a licensee. The provision of these services under a management agreement does not impart the degree of ultimate control over the licensee so as to affect a transfer of control under Intermountain and Columbia does not offer any evidence to undercut the application of the Intermountain test.

Under Columbia's proposal a construction agreement would create a subcontractor relationship and trigger spectrum attribution. However, such a basic relationship does not, in any sense, give rise to the potential competitive concerns that caused the Commission to issue this SFNPRM. The construction contractor will not have access to sensitive customer information or the ability to affect pricing decisions. Further, Columbia does not, indeed cannot, explain how such a limited management role could adversely affect competition. Accordingly, Sprint urges the Commission to reject all of Columbia's proposals.

Finally, reply to the comments of PCC Management Corp. ("PCC") is required. PCC does not support or argue against attribution because of non-equity relationships. Rather PCC also urges the Commission to refine the Intermountain test by adding a safe harbor rule. As noted above, proposals to refine the Intermountain test are beyond the scope of this proceeding and are unwarranted. Intermountain more than adequately provides the

standard for de facto transfers of control and no changes, refinements, or safe harbors are warranted.

In conclusion, Sprint supports and agrees with the overwhelming majority of commenters who argue that no attribution of spectrum should be triggered by the specified non-equity relationships. Furthermore, proposals to refine or amend the Commission's Intermountain test are beyond the scope of this proceeding and are unwarranted.

Respectfully submitted,

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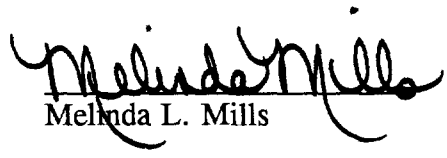
CERTIFICATE OF SERVICE

I, Melinda L. Mills, hereby certify that I have on this 19th day of August, 1994, sent via U.S. First Class Mail, postage prepaid, or Hand Delivery, a copy of the foregoing "Reply Comments" in the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252 filed this date with the Acting Secretary, Federal Communications Commission, to the persons on the attached service list.



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